No. 91-7094

In The

Supreme Court of the United States

October Term, 1991

WILLIE LEE RICHMOND,

Petitioner,

v.

SAMUEL A. LEWIS, Director Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether petitioner's death sentence contravenes the Eighth and Fourteenth Amendments because it was upheld by the Arizona Supreme Court on the basis of an application of Arizona's "especially heinous, atrocious or cruel" aggravating circumstance which either extends the circumstance to a set of facts that no rational factfinder could conclude fall within it or arbitrarily assumes a set of facts that no actual factfinder has ever found in this case.

2. Whether a federal habeas corpus court may apply a rule of "automatic affirmance" to a death sentence which was based on both constitutional and unconstitutional aggravating circumstances, when the law of the state that imposed the sentence requires the sentencer to weigh these aggravating circumstances against the mitigating circumstances in determining the penalty.

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The first opinion of the Supreme Court of Arizona affirming the Petitioner's conviction and death sentence is reported at 560 P.2d 41 and appears at J.A. 46. The divided opinion of the Supreme Court of Arizona affirming Petitioner's death sentence after resentencing is reported at 666 P.2d 57 and appears at J.A. 77.

The trial court's sentencing decisions are unreported. A copy of the minute entry containing the original sentencing decision appears at J.A. 43. A copy of the minute order on resentencing appears at J.A. 73.[1]

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was issued December 26, 1990; a timely Petition for Rehearing was denied on October 17, 1991. This Petition was filed on January 15, 1992. The

[1] A copy of the transcript of the trial court's remarks on resentencing appears at Appendix D to the Petition for Certiorari.

jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the following provisions of the law of the State of Arizona:

– Arizona Revised Statutes § 13-703E, which provides:

> In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

– Arizona Revised Statutes § 13-703F, which provides in part:

> Aggravating circumstances to be considered shall be the following:
>
> • • •
>
> 6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

STATEMENT OF THE CASE

Petitioner Willie Lee Richmond is under a death sentence imposed by an Arizona judge, upon a jury verdict finding him guilty of the felony murder of Bernard Crummett in August, 1973.

1. The Offense and Trial.

There is little dispute about the basic facts of the crime for which Petitioner was sentenced to death. They were summarized by the Arizona Supreme Court as follows:

> The conviction arose from a 1973 incident where appellant and his 15-year-old girlfriend, Faith Erwin, accompanied Becky Corella and Bernard Crummett to a Tucson motel. Becky had arranged to perform an act of prostitution with Crummett. Becky informed appellant that

Crummett was "loaded." Appellant decided to rob Crummett.

Appellant accompanied by the two women and Crummett drove to a deserted area outside Tucson ostensibly for Crummett to engage in another act of prostitution with Becky. Appellant stopped the car feigning a flat tire. Appellant alighted from the car and went to the passenger side where he pulled Crummett from the car. Appellant knocked Crummett to the ground, and, as Crummett lay on the ground, appellant hit him with several large rocks, causing Crummett to lose consciousness. Becky took the victim's watch and wallet from his pockets. Appellant and the two women left Crummett lying unconscious on the ground, but, before leaving, the vehicle was twice driven over him.

Medical testimony revealed that Crummett died of a compressive injury to the skull consistent with the excessive force of a wheel of a car. At trial Faith Erwin testified that appellant was the driver of the automobile when it was driven over the victim. Appellant claimed that Becky Corella was the driver.

J.A. 78.

Faith Erwin's testimony was given under a grant of immunity from prosecution for her role in the crime. J.A. 33. This is what she said regarding Mr. Crummett's death:

> A. [Erwin] Well, they all got in the car, and Becky [Corella] was getting the wallet and what else, you know. I looked over to see what else was taken. And Becky [Corella] was getting the wallet and we came in the car and left.

> Q. And where did you go from there?
>
> A. Back to the Sands Motel.
>
> Q. Did you run over anything?
>
> A. Yes, a man. It was a bump, after we were leaving.
>
> Q. After you felt that bump, was anything said in the car when you felt that bump?
>
> A. Becky [Corella] said, it felt like a man's body.
>
> Q. Who was driving the car?
>
> A. Willy [sic].

J.A. 26. On cross-examination, Erwin admitted that at the crucial moment she was under the influence of drugs and was lying down in the back seat of the car with her eyes closed. J.A. 26, 28. She said she was uncertain whether Rebecca Corella was in the front or back seat, but she was sure it was Willie Richmond who was driving. J.A. 28. A defense witness testified to a prior inconsistent statement, in which Erwin had said that Rebecca Corella was the driver. Tr. Trial 663.

Petitioner did not testify. His version of the events came from a taped statement which was offered into evidence by the prosecution. In that statement, which was taken from him by police on the night he was served with

the arrest warrant in this case,[2] he described the events as follows:

> I opened the door. I snatched the dude out by his collar, and bam, he falls straight out. I wanted to go through his pockets, but she [Corella] was already going through his pockets and he was getting up and I reached down and punched him again. So my old lady, Faith Erwin, she couldn't take it. She got out of the car and she looked and she started crying, you know. And about that time I am looking at her, and going through his change. And this rock, you know, like that, and dip, dip like that, you know. And I said, wow, to myself, you know. Come on let's get in the car and me and her [Erwin] get in the car, and I am talking to her [Erwin] and Rebecca [Corella] gets in the car and she backed up and she throws up in gear and comes back over. And we were going on down further and she was all over the fucking road, and said give me this motherfucking car and let me drive, you know.

J.A. 36.

Rebecca Corella was not called to testify by either side – although she, too, was granted immunity from prosecution.

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[2] At the time of his statement, Petitioner was in jail under unrelated charges, on which he was represented by counsel. There was evidence that the police had served him with the arrest warrant in order to obtain a waiver of counsel and a statement from him; but the statement was held admissible. *See* J.A. 49-51.

The remaining trial evidence regarding Bernard Crummett's death was circumstantial. The most important of this evidence came from the state's pathologist, Dr. James Holka. Dr. Holka testified that the injuries on Mr. Crummett's body indicated a car had passed over him more than once, from "at least two directions." J.A. 6. The first of the injuries was to the head, and instantly caused death. J.A. 14. The later injuries were to the trunk; these did not exhibit hemorrhaging, which indicated they had occurred after death and the cessation of blood circulation. J.A. 7.

Dr. Holka was questioned extensively on the probable length of time between the initial and later injuries. J.A. 15-22. Most of this questioning came from defense counsel, who was attempting to support the theory that Mr. Crummett might have been run over by another car, after the robbers fled the scene.[3] However, Dr. Holka made his clearest statement on this point during questioning by the prosecutor about his estimate that "thirty seconds" was an "approximate minimum period of time" between the initial and later injuries:

> That is based on the fact that venous circulation in an adult male for his build would be approximately twenty seconds, if the heart were faster than fifteen if slower than twenty-five. So, we are giving a slight edge there in agreeing to about thirty seconds.

J.A. 19-20.

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[3] *See* J.A. 19, 21. Also in support of this theory, the defense called Charles Palmer, an attendant at a service station near the scene of the crime, who testified that approximately four cars drove down the road where the body was found, after the time of the homicide. J.A. 38.

The trial judge instructed the jury that it could convict Petitioner of first-degree murder upon either a finding of premeditation or a felony-murder theory.[4] These were its instructions defining these offenses:

> Murder is the unlawful killing of a human being, with malice aforethought.
>
> * * *
>
> The unlawful killing of a human being whether intentional, unintentional, or accidental which occurs as a result of the perpetration of or attempt to perpetrate the crime of robbery and where there was in the mind of the perpetrator a specific intent to commit such crime is murder of the first degree.
>
> * * *
>
> If a human being is killed by any one of several persons engaged in the perpetration of or attempt to perpetrate the crime of robbery, all persons who either directly or actively commit the act constituting such crime or who knowingly and with a criminal intent aid and abet in its commission, or whether present or not who advise or encourage its commission are guilty of murder in the first degree, whether the killing is intentional, unintentional, or accidental.

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[4] The Information by which Petitioner was charged originally alleged that he had killed Mr. Crummett "with malice aforethought and premeditation and deliberation." The premeditation allegation was stricken by Judge Roylston. *See* J.A. 2. However, over defense objection, the prosecution was permitted to proceed at trial on alternative theories of premeditated and felony-murder.

J.A. 108; *see* J.A. 41. There were no instructions on lesser degrees of homicide. The jury returned a general verdict finding Petitioner guilty of first-degree murder. J.A. 42.

2. The First Sentencing and Appeal.

Pursuant to Arizona law, the sentencing hearing was held before the trial judge alone. The trial judge was Richard Roylston.

In his sentencing verdict, Judge Roylston found two "aggravating factors": a prior conviction involving a threat of violence,[5] and the commission of the instant offense in "an especially heinous and cruel manner". J.A. 44. The judge rejected the defendant's proffered mitigation, holding that it did not make out any of the mitigating circumstances listed in the Arizona law, and imposed a sentence of death. *Ibid.*; *see* J.A. 63.

After this sentencing, Mr. Richmond's lawyers filed a Petition for Post-Conviction Relief, based on newly discovered evidence which substantiated the defense claim that Rebecca Corella was actually driving the getaway car when it accidentally ran over Bernard Crummett. The Petition was supported by affidavits from two people

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[5] The prior conviction was for an armed kidnapping incidental to a robbery. The victim of the robbery, who was uninjured, was called to testify to establish that the crime included a threat of violence. *See* J.A. 62; Tr. Resentencing I:42-56.

who swore that Ms. Corella had admitted this to them.[6] The trial court denied the Petition without a hearing.

On appeal, the Arizona Supreme Court affirmed Mr. Richmond's conviction and sentence, rejecting all his state law claims and constitutional objections to his death sentence. *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915 (1977); J.A. 46. The Court also affirmed the denial of the post-conviction relief petition, holding that Mr. Richmond was "criminally liable for this murder regardless of whether he or his accomplice was driving the vehicle at the time in question." J.A. 58.

3. The Resentencing and Second Appeal.

Petitioner's sentence was vacated, and resentencing was ordered, as a result of decisions by the United States District Court and the Supreme Court of Arizona, which held the Arizona death penalty statute invalid under *Lockett v. Ohio*, 438 U.S. 586 (1978). *Richmond v. Cardwell*, 450 F.Supp. 519 (D. Ariz. 1978); *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978).

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[6] In response to the Petitioner's motion, the prosecutor filed an affidavit which stated that during the trial Ms. Corella had "threatened to take the stand for the defense and take the blame for the murder," but defense counsel had elected not to call her. *See* Resp. Br. Opp. Exhibit B-1. Attached to the affidavit was a transcript of a taped statement by Ms. Corella, in which she said that Willie Richmond was driving the vehicle when Bernard Crummett was run over, "once". *Id.* at Exhibit C-9.

At the resentencing hearing, the State again presented witnesses regarding the defendant's criminal record, but otherwise rested on the trial evidence.[7] The defense called sixteen witnesses, on two subjects. Thirteen of them – including members of Petitioner's family, friends, and two prison staff members – testified about substantial positive changes he had undergone while on death row. *See* J.A. 97-99. The other witnesses were called to support the defense argument that Rebecca Corella caused Bernard Crummett's death. They testified that, contrary to her statements to police, Corella could drive the car in question, which belonged to her boyfriend; and that she or Faith Irwin had previously admitted she was driving the car when it ran over Bernard Crummett. See J.A. 142.

In his second sentencing verdict, Judge Roylston found three aggravating circumstances – the original two, plus a third based on a homicide conviction entered after the first sentence was imposed.[8] J.A. 73-74. As he had in the first sentencing order, with regard to the "heinous, cruel or depraved" aggravating factor, Judge Roylston

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[7] The prosecution did not rely upon the statements of Rebecca Corella it submitted in postconviction proceedings. Under Arizona law, aggravating circumstances must be established by admissible evidence. Ariz. Rev. Stat. § 13-703(C).

[8] The homicide on which the new aggravating circumstance was based occurred before Bernard Crummett's. Mr. Richmond was also subsequently tried on a third murder charge, at which the state's primary witness was Rebecca Corella, and the defense was that the crime was, in fact, committed by Ms. Corella; the jury acquitted Mr. Richmond on that charge.

stated without elaboration "that the Defendant did commit the offense in an especially heinous and cruel manner." *Ibid*. In mitigation, he found most of the matters the defense had argued, except the defendant's claim of rehabilitation, on which he said he was "unable to make a definitive finding." J.A. 75. Among the facts found in mitigation were that "Rebecca Corella was involved in the offense but was never charged" and "the jury was instructed both on the matters relating to the felony murder rule, as well as matters relating to premeditated murder." *Ibid*. The sentencing decision did not otherwise address the question of who was driving the car at the time it ran over Mr. Crummett and caused his death. It concluded:

> that considering both the enumerated circumstances in the statutes and the enumerated circumstances raised by the Defense, and having considered them separately and as a whole, THE COURT FINDS that there are no mitigating circumstances sufficiently substantial to call for leniency.

J.A. 76.

On appeal, the Arizona Supreme Court once again upheld Petitioner's death sentence. There were three separate opinions. The "majority" opinion,[9] signed by Justices Holohan and Hays, affirmed the trial court in all

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[9] We mean no disrespect by our references to "the 'majority' opinion." The separate concurring and dissenting opinions use that phrase; but it is of considerable significance that Justice Holohan's opinion did not, in fact, reflect the views of a majority of the Arizona Supreme Court on the matters at issue here. That is why we repeat the reference in this Brief, and use quotation marks.

respects, except its finding that the offense was "especially cruel." J.A. 77-92. Concurring, Justices Cameron and Gordon held that the crime could not properly be found "heinous," but voted to affirm the sentence. J.A. 92-96. A dissenting opinion, by Justice Feldman, agreed with the concurrence that the crime was not "heinous," and voted to reduce the sentence to life imprisonment. J.A. 96-101.

The concurring and dissenting opinions did not dispute the summary of the facts of the case in Justice Holohan's "majority" opinion, which is set forth above. *See* page 4. There was also no disagreement over the rejection of Petitioner's claim that his death sentence was imposed in violation of *Enmund v. Florida*, 458 U.S. 782 (1982). It was with reference to the latter point that Justice Holohan's opinion made its most specific statements regarding its view of Petitioner's role in the offense:

> Appellant admitted he planned the robbery, drove the victim into the desert and knocked the victim unconscious to rob him. Faith Erwin testified that appellant threw rocks at the victim after he knocked him to the ground. Bloody rocks were found at the scene. The medical examiner testified that there were two kinds of force applied to the victim's skull – one which was consistent with the automobile tire and another in which there was external application of a pointed object. There is, however, no evidence that the latter force alone would have killed the victim.
>
> Even if we accept appellant's contention that he was not driving the car when the victim was run over, we do not believe this case falls

within the parameters of *Enmund*. The facts from the appellant's version indicate that he was the leader of the group; he was the first to use violent force on the victim; he was aware that the victim, if allowed to live, could identify him.[10] Appellant, from his version of the facts, was willing to leave the wounded and unconscious victim alone in the desert to an uncertain fate. Appellant contends that Becky Corella was the one who drove the car over the victim. There is no evidence that appellant protested or showed any emotion when the victim was twice run over. The appellant's version of the facts indicates appellant played an integral part in the events which caused the victim's death, and he willingly assisted in the acts which were intended to cause the victim's death.

The evidence presented by the state was that the appellant drove the vehicle over the victim, thus killing him. The testimony of Faith Erwin was that the appellant was the driver at the time the victim was run over. The circumstantial evidence supports Faith's testimony. The circumstances show that appellant was the driver when the group left for the desert. The other woman, Becky Corella, was so short in stature that it was difficult for her to operate an automobile. Appellant was the leader of the

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[10] We are aware of no specific evidentiary basis for this statement. Justice Holohan's first opinion noted an inconsistent fact: Petitioner had earlier said to Faith Erwin "that the three were going to rob the victim, but not in the apartment because Crummett would remember the location." J.A. 46.

group and directed the operation. With such support we believe the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim.

Under either version of the facts appellant does not fit within the sphere of defendants the *Enmund* court seeks to protect from capital considerations. The evidence in this case shows that appellant intended to take a life.

J.A. 83-84.

Justice Holohan's "majority" opinion also addressed the facts in its review of the trial court's determination that the offense was "especially cruel and depraved." Expressing the court's unanimous judgment, it reversed the first part of this finding because of the lack of evidence of conscious suffering by the victim, prior to his death:

> We do not find the offense to be especially cruel; there is no evidence in the record to indicate the victim suffered more pain than that of the initial blow which rendered him unconscious.

J.A. 86. In support of its minority view that the killing was "heinous" and "the trial court could have found that the offense was committed in an especially depraved manner," Justice Holohan's opinion said this:

> "Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." *State v. Knapp, supra*. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. *State v. Gretzler, supra; State v. Poland, supra; State v. Lujan, supra*. In *Gretzler, supra,*

we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. Again the fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a ghastly mutilation of the victim.

> The presence of any one of the three elements – cruel, heinous, or depraved – is sufficient to constitute an aggravating circumstance. *State v. Bishop*, 127 Ariz. 531, 622 P.2d 478 (1980). We believe the facts of this case set it "apart from the normal first degree murders." *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979).

J.A. 86-87.

The opinion then went on to conduct an "independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give to each." J.A. 88. It concluded that "the mitigation offered by appellant is not sufficiently substantial to outweigh the aggravating circumstances," noting particularly the defendant's other

murder conviction and "the gruesome manner in which this murder was committed." J.A. 90.

The separate opinion of the two concurring Justices disagreed with the finding that this crime was especially heinous and depraved. J.A. 92. It said this:

> Here there is no suggestion of distinct acts, apart from the killing, specifically performed to mutilate the victim's body. Any disfigurement of the victim in this case was the direct result of the killing itself. I do not believe we should stretch the definition of "mutilation" to cover all murders in which the victim's body is disfigured, where there is no indication of a separate purpose to mutilate the corpse. It is true, of course, that the appearance of the victim in this case was "ghastly" as the majority states. But as the United States Supreme Court has recently said in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (reversing an application of Georgia's statutory aggravating circumstance of "outrageously or wantonly vile, horrible or inhuman"),
>
> > [I]t is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer. An interpretation of [the aggravating circumstance] so as to include all murders resulting in gruesome scenes would be totally irrational. *Id.* at 433, n.16, 100 S.Ct. at 1767, n.16, 64 L.Ed.2d at 409, n.16 (plurality opinion) *See also id.* at 435, 100 S.Ct. at 1768, 64 L.Ed.2d at 410-11 (Marshall, Brennan, J.J., concurring) ("[We] also agree that • • • the fact that the murder weapon was one which

> caused extensive damage to the victim's body is constitutionally irrelevant.")

J.A. 94-95. The concurring Justices concluded "[t]his crime is therefore not above the norm of first degree murders." J.A. 95. They explained their agreement that the death sentence should be nonetheless affirmed, as follows:

> The criminal record of this defendant, however, clearly places him above the norm of first degree murderers. He has been convicted of another first degree murder and a kidnapping, each arising in separate incidents. This history of serious violent crime justifies the imposition of the death penalty.

J.A. 95-96.

Justice Feldman's dissenting opinion agreed with the concurrence "that the murder was not heinous and depraved," and "the crime here does not stand out 'above the norm of first degree murders'; thus, the imposition of the death penalty in this case is clearly based upon the character of the defendant." J.A. 96. However, he argued that "independent review on the death penalty issue involves more than a determination of whether the trial court's imposition of this penalty can be supported by the record." J.A. 100. After extensively reviewing the mitigating evidence, he concluded that it called for a reduction of Petitioner's sentence to life imprisonment:

> While the aggravating circumstances which were found to exist may indicate that the defendant was above the norm of murderers, the evidence of changed character is persuasive mitigation. Review of this record indicates

> strong evidence of rehabilitation and the probability that if allowed to live, defendant will make a contribution of some value to society. Then what is to be gained by imposing death under these circumstances? Except in the physical sense, the defendant whom we today consign to the gas chamber is not the same person who committed the crime in 1973 and was first sentenced to death in 1974.

Ibid.

4. The Proceedings and Opinions Below.

Petitioner's federal habeas corpus petition was summarily dismissed by District Court Judge Alfredo Marquez. *Richmond v. Ricketts*, 640 F. Supp. 767 (D. Ariz. 1986).[11] Judge Marquez rejected Petitioner's *Godfrey* claim, with this reasoning:

> Of the five justices on the Supreme Court, none of them found the killing to have been especially cruel. Three of them held that the killing did not satisfy either the especially heinous or depraved standards. Since a majority of the Supreme Court found this circumstance to be

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[11] Judge Marquez initially dismissed the petition on his own motion, before the Respondent filed an answer; the Court of Appeals reversed and remanded. *Richmond v. Ricketts*, 730 F.2d 1318 (9th Cir. 1984). On remand, Judge Marquez again summarily dismissed the petition and denied a certificate of probable cause. The Court of Appeals again granted a certificate of probable cause and reversed and remanded for a review of the state court record. *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir. 1985). The final dismissal in District Court came after this second remand.

> absent, this court must conclude that Richmond's sentence of death is not based on the application of that aggravating circumstance.

640 F.Supp. at 795-96.

The Court of Appeals granted a certificate of probable cause, but affirmed. J.A. 104. Its panel opinion did not accept Judge Marquez' reasoning with respect to the present issue, but held that neither of the opinions of the Arizona Supreme Court ran afoul of this Court's Eighth Amendment precedents.

Regarding the Arizona "majority's" determination that the crime was "heinous" or "depraved," it held the only question before it was whether a "rational factfinder" could have so found under " 'the definition given to the "especially cruel" provision by the Arizona Supreme Court . . . . ' " J.A. 128, *quoting Walton v. Arizona*, 110 S.Ct. 3047, 3058 (1990). Without specifying the factual basis for its conclusion, it said "that under that definition a rational factfinder could indeed have found Crummett's murder heinous or depraved so as to warrant the penalty of death." *Ibid.*

> The fact that a majority of the court did not concur in this finding, however, does not deny that the Justices who did concur in it provided an adequate limiting construction. The relevant point is that members of the court who premised their votes on the challenged factor undertook the deliberations and analysis constitutionally required.
>
> More importantly, Richmond's observation is irrelevant in light of the fact that *four* Justices concurred in the finding of two other aggravating circumstances, either one of which could constitutionally have justified imposition of the death penalty.

J.A. 125 n.9.[12]

Petitioner's Suggestion for Rehearing En Banc was rejected, over four dissents. J.A. 104. The dissenters said they did not believe the "heinous" finding could be sustained in light of the fact that "[n]either the jury, the sentencing court, nor the Arizona Supreme Court has expressly resolved the dispute over who drove the car over the victim's body." J.A. 143. They also disagreed with the panel's reading of Arizona law, with regard to the constitutional significance of the invalidity of this aggravating finding:

> Without citing any authority, the panel mistakenly concludes that the aggravating circumstances do not influence the Arizona sentencer's inquiry into whether the mitigating circumstances are sufficiently substantial. 921 F.2d at 947. On the contrary, it is clear that the trial judge determines whether the mitigating circumstances are "sufficiently substantial" by evaluating them in relation to the aggravating circumstances that exist. This is a balancing, a process of weighing.
>
> Numerous cases of the Arizona Supreme Court confirm that the sentencer determines whether

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[12] The original panel opinion said more succinctly, "the statute at issue here is not a weighing statute." *Richmond v. Lewis*, 921 F.2d 933, 947 (9th Cir. 1990). This language, but not the panel's analysis, was changed on rehearing.

mitigating evidence is "sufficiently substantial" by weighing it against aggravating circumstances.

J.A. 147.

In Richmond's case, the trial court found that there were a number of mitigating circumstances. *See State v. Richmond*, 136 Ariz. 312, 666 P.2d 57, 65 (1983). It was only by comparing them to the aggravating circumstances that the sentencer concluded that they were not sufficiently substantial to warrant leniency. If a reviewing court's analysis reduces the number of valid aggravating circumstances, it reduces the weight and gravity of the aggravating factors that the sentencer may permissibly consider. The reviewing court can no longer rely on an earlier finding that the mitigating circumstances were not sufficiently substantial to call for leniency. A new balancing must be conducted in order to determine whether the mitigating circumstances are sufficiently substantial in relation to the remaining valid aggravating factors.

J.A. 148-49.

Petitioner sought certiorari on the two issues addressed by these dissenting Judges. The Petition was granted on March 30, 1992.

SUMMARY OF ARGUMENT

The trial judge based Petitioner's death sentence in part on a finding that this offense was "especially heinous and cruel" under Arizona Rev. Stat. § 13-703(F).

J.A. 74. Petitioner's resentencing predated *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983); *Gretzler* supplied the narrowing construction which *Walton v. Arizona*, 110 S.Ct. 3047, 3057-58 (1990) found to have cured the facial vagueness of this statute. The trial judge's sentencing order applied no limiting definition, but simply recited the statutory terms. As the Court of Appeals panel recognized, this was constitutionally impermissible under *Maynard v. Cartwright*, 486 U.S. 356 (1988). J.A. 123.

This case therefore turns on the Arizona Supreme Court's exercise of its authority under *Clemons v. Mississippi*, 110 S.Ct. 1441 (1990), to independently determine the existence of this aggravating factor under a limiting construction, or to review for harmless error. The Arizona Supreme Court's two-Justice "majority" opinion attempted to take the first of these approaches; the two-Justice concurrence took the latter. The issue here is whether either fell into federal constitutional error. Petitioner submits both did.

1. Justice Holohan's "majority" opinion, which relies upon the F(6) aggravating factor, is not clear about the basis on which it does so.

The "majority" does not appear to have "affirm[ed] the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented." *Walton v. Arizona*, 110 S.Ct. at 3057. Although its opinion recites one of *Gretzler*'s limiting phrases, it then changes its words (from "needless mutilation" to "ghastly mutilation"), making it irrelevant whether the Petitioner actually caused the victim's death. This changed the basic nature of the construction of this aggravating factor,

which had previously focused on "the mental state and attitude of the offender as reflected in his words and actions." On the facts of this case, it was impossible to address the latter question without deciding whether Petitioner was driving; yet the opinion pointedly refrained from doing that. To the extent it addressed this factual issue at all, it appears to have "affirm[ed] the sentence based on a mischaracterization of the trial judge's findings." *Parker v. Dugger*, 111 S.Ct. 731, 739 (1991).

Alternatively, the "majority" opinion could be read as establishing a new and broader definition of a category of "heinousness." However, the rejection of that proposal by the three of the five Arizona Supreme Court Justices means that "definition" is not part of Arizona law. Moreover, to perform its constitutional function, a limiting definition must necessarily be "establish[ed] in advance." *Walton v. Arizona*, 110 S.Ct. at 3067 (concurring opinion of Justice Scalia). And as the other Arizona Justices pointed out, a limiting definition which "include[s] all murders resulting in gruesome scenes" would directly contravene *Godfrey v. Georgia*, 446 U.S. 420, 433 n.16 (1980).

The remaining, and most likely, possibility is that the "majority" Justices did what *Maynard* and *Godfrey* forbade: they "simply . . . reviewed all of the circumstances of the murder and decided . . . the facts made out the aggravating circumstance." *Maynard v. Cartwright*, 486 U.S. at 360.

2. Although they disagreed with the "majority's" reliance on the "heinous" aggravating circumstance, the

concurring Arizona Justices fell into constitutional error under *Clemons v. Mississippi, supra.*

As the fifth, dissenting Justice pointed out, their review was limited to "a determination of whether the trial court's imposition of this penalty can be supported by the record." J.A. 100. The concurrence found that support in the remaining aggravating factors, which involved the defendant's prior record. J.A. 95. But a criminal record does not eliminate "[t]he constitutional mandate of individualized determinations in capital-sentencing proceedings." *Sumner v. Shuman*, 483 U.S. 66, 75 (1987).

The requirement of individualized sentencing means that an "appellate court in a weighing state [cannot] . . . affirm a death sentence without a thorough analysis of the role an invalid aggravating factor played in the sentencing process." *Stringer v. Black*, 112 S.Ct. 1130, 1136 (1992). The concurrrence provided no such analysis.

The Court of Appeals panel below excused this by denying that Arizona is a weighing state. J.A. 131-32. But the Arizona Supreme Court has repeatedly said the opposite. The panel decision below simply misunderstood this. Recognition of it invalidates the decision of the concurring Justices in this case.

3. Although Petitioner submits that all four of the Arizona Supreme Court Justices who voted to affirm his death sentence erred, in one of these two ways, reversal is required even if he is only right on one of those submissions. Both two-Justice pluralities were necessary to provide the three votes necessary to affirm Petitioner's

sentence. Had either group voted differently, the outcome of the case would have been different. In such situations – when the votes of a plurality of lower court judges necessary to the decision below is based on an invalid premise – the Court has logically held that remand is required. *United Airlines v. Mahin*, 410 U.S. 623, 632 (1972). If the Court accepts either of Petitioner's submissions, that should be required here.

ARGUMENT

The Court has twice examined Arizona's "heinous, cruel or depraved" aggravating factor. *Walton v. Arizona*, *supra*; *Lewis v. Jeffers*, 110 S.Ct. 3092 (1990). Those decisions settled two basic points about this statute: (1) its unadorned language is facially vague and unconstitutional under *Maynard v. Cartwright*, 486 U.S. 356 (1988); and (2) the Arizona Supreme Court has developed a narrowing construction of the statutory language which meets Eighth Amendment standards. *See Walton v. Arizona*, 110 S.Ct. at 3056-58; *Lewis v. Jeffers*, 110 S.Ct. at 3102. In *Walton*, the Court also applied to Arizona the holding of *Clemons v. Mississippi*, 110 S.Ct. 1441 (1990), which permits a state appellate court reviewing a death sentence which is invalid under *Maynard* to

> itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or . . . eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty.

Walton v. Arizona, 110 S.Ct. at 3057. The questions presented here arise out of the manner in which two pluralities of the Arizona Supreme Court exercised that power.

I.

THE ARIZONA COURTS' RELIANCE ON THE "HEINOUS, CRUEL OR DEPRAVED" AGGRAVATING CIRCUMSTANCE VIOLATED THE EIGHTH AMENDMENT.

At both his sentencings, and on both of his state court appeals, Petitioner's death sentence was imposed and upheld partly on the basis of Arizona Rev. Stat. 13-703(F)(6), which lists among the "[a]ggravating circumstances to be considered" that "the defendant committed the offense in an especially heinous, cruel or depraved manner." *See* J.A. 44, 62, 74, 87. This was done despite the fact that neither the trial judge, nor the Arizona Supreme Court, clearly identified any words or action by Petitioner that made it so. Their decisions were thus fundamentally different from those in *Walton v. Arizona* and *Lewis v. Jeffers*, and are irreconcilable with this Court's Eighth Amendment precedents.

A. The Trial Court's Decision.

The trial judge who sentenced and resentenced Willie Richmond used only the bare statutory terms, "heinous and cruel." J.A. 44, 62. The original sentencing occurred in 1974, before any appellate decision had placed a limiting construction on those words. *See* J.A. 43. The resentencing predated *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1

(1983), which provided the narrowing definitions this Court relied upon in *Walton*, as a cure for the Arizona statute's facial vagueness.[13]

On the second appeal, the Arizona Supreme Court held unanimously that the trial court erred in its conclusion that the offense was "especially cruel." J.A. 86. Three of the five Arizona Justices – a majority – concluded that the crime was not "heinous." J.A. 95, 96. The two who held otherwise did so by an analysis of their own, based on *Gretzler*'s limiting definitions, which played no part in the trial court's decision. *See* pages 30-36, below.

The trial judge's finding of this aggravating factor thus cannot be sustained, either as a matter of Arizona

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[13] In its Brief in *Walton*, the Attorney General of Arizona summarized the *Gretzler* categories of "heinous" and "depraved" murders, as follows:

> The Arizona Supreme Court has held that a defendant's actions must fall into one of the following categories to constitute the aggravating circumstance: (1) relishing the murder; (2) infliction of gratuitous violence upon the victim above that which was necessary to complete the object of the crime; (3) needless mutilation of the victim; (4) senseless crime; or (5) helpless victim. *State v. Gretzler*, 659 P.2d at 11.

Brief of Respondent at 46, *Walton v. Arizona*, No. 88-7351. In both *Walton* and *Jeffers* the Arizona courts relied on actions of the defendants which placed them in the first of these categories. *See Walton v. Arizona*, 110 S.Ct. at 3058; *Lewis v. Jeffers*, 110 S.Ct. at 3097. *Walton* also involved a finding that the murder was "especially cruel." 110 S.Ct. at 3057-58.

law or under the federal constitution. The state law question was resolved by the Arizona Supreme Court's unanimous determination that the trial court erred in finding the offense "especially cruel," and by the votes of the three Arizona Justices who held that the trial court also erred in finding it "heinous." *See* J.A. 93-95, 96. To the extent this is an issue on which federal courts must give deference to the decisions of state judges, *see Lewis v. Jeffers*, 110 S.Ct. at 3103, their decision is controlling.

The constitutional question is easily answered, from this Court's precedents. The trial court used only the bare statutory words, "heinous" and "cruel." J.A. 74. "[T]here is no serious argument that . . . [those words are] not facially vague." *Walton v. Arizona*, 110 S.Ct. at 3057. Sentencing decisions based on instructions which include nothing more than those words are unquestionably invalid. *Stringer v. Black*, 112 S.Ct. 1130, 1134-35 (1992); *see also id.* at 1143 (dissenting opinion of Justice Souter).

Although "[t]rial judges are presumed to know the law and apply it in making their decisions," *Walton v. Arizona*, 110 S.Ct. at 3057, at the time of the resentencing decision in this case the law of Arizona did not limit the broad and vague scope of these terms. Before *Gretzler*, the caselaw definition of the words "heinous" and "depraved" in Arizona was this:

> heinous: hatefully or shockingly evil; grossly bad. . . . depraved: marked by debasement, corruption, perversion or deterioration.

State v. Knapp, 114 Ariz. 531, 562 P.2d 704, 716 (1977). *See* J.A. 70. Nearly identical "definitions" of similar terms

were held constitutionally inadequate in *Maynard v. Cartwright, supra,* and *Shell v. Mississippi,* 111 S.Ct. 313 (1990).[14]

The trial judge's decision thus cannot be sustained. The validity of Petitioner's sentence necessarily turns on the independent validity of the decision of the Arizona Supreme Court, which affirmed it.

B. The Arizona Supreme Court "Majority" Opinion.

The two Justice Arizona Supreme Court "majority" rejected the trial court's finding that the offense was "especially cruel," because "there is no evidence in the record to indicate that the victim suffered more pain than that of the initial blow which rendered him unconscious."

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[14] *See Shell v. Mississippi,* 111 S.Ct. at 313-14 (concurring opinion of Justice Marshall):

> "[T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." *Shell v. State,* 554 So.2d 887, 905-906 (Miss. 1989).
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> "[T]he term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others." *Cartwright v. Maynard,* 822 F.2d 1477, 1488 (CA10 1987) (en banc).

Ibid. See also Moore v. Clarke, 904 F.2d 1226, 1229-30 (8th Cir. 1990), *cert. denied* 60 U.S.L.W. 3772 (May 18, 1992).

J.A. 86. Addressing the remaining questions of "heinousness" and "depravity," it began by reciting the general "definitions" that previous Arizona cases had given:

> "Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." *State v. Knapp, supra.*

Ibid. As that general language added no constitutionally significant "narrowing" to the facially vague statutory terms, (*see* note 14, above), the validity of the "majority's" analysis turns on the following passage, in which it elaborated upon its conclusion that this aggravating factor properly applied in this case:

> In *Gretzler, supra,* we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. Again the fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a ghastly mutilation of the victim.

J.A. 86-7.

The Court of Appeals' panel apparently took this passage to mean that the Arizona "majority" had "affirm[ed] the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented," consistent with *Walton v. Arizona*, 110 S.Ct. at 3057. *See* J.A. 123-26. However, the *Gretzler* definitions of "heinousness" focused on "the mental state and attitude of the perpetrator as reflected in his words and actions." *State v. Gretzler*, 659 P.2d at 10. Because of that, to apply them would require, at least, a determination that it was Petitioner who was driving the car when it passed over the victim after his death. Yet the language of Justice Holohan's "majority" opinion appears to carefully refrain from making any such finding, at this point or in its earlier discussion of the *Enmund* issue. *See* J.A. 83-4, 86-7.

In that earlier discussion, the opinion says that "the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim." J.A. 84. But a review of the trial judge's sentencing orders reveals no such statement; to the contrary, the mitigation findings at the second sentencing hearing appear to give credence to the possibility that Rebecca Corella was the driver, and Petitioner was convicted on a vicarious, felony murder theory.[15] In this respect, Justice Holohan's opinion suffers from much the same problem found in *Parker v. Dugger*, 111 S.Ct. 731, 739 (1991): it "affirm[ed]

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[15] *See* JA 75 ("Rebecca Corella was involved in the offense but was never charged with any crime"); ("the jury was instructed both on matters relating to the felony murder rule, as well as matters relating to premeditated murder").

the sentence based on a mischaracterization of the trial judge's findings." "[M]eaningful appellate review requires that the appellate court consider the defendant's actual [conduct]." *Ibid.* "[T]his affirmance was invalid because it deprived [Petitioner] . . . of the individualized treatment to which he was entitled under the Constitution." 111 S.Ct. at 738, 740.

Even if it were assumed to contain an implicit *de novo* finding that Petitioner was driving, Justice Holohan's opinion would raise more questions than it would answer. For one thing, it would create the problem anticipated in *Cabana v. Bullock*, 474 U.S. 376, 388 n.5 (1986), by resolving an issue which "turn[s] on credibility determinations that could not be accurately made by an appellate court on a paper record."[16] In addition, it would violate due process by resting the "heinousness" finding on a wholly different basis from that argued at trial, one which defense counsel had no way to anticipate at the time the evidence came in. Cf. *Presnell v. Georgia*, 439 U.S. 14 (1978); *Cole v. Arkansas*, 333 U.S. 196 (1948).[17]

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[16] Although an earlier passage in the opinion says "the circumstantial evidence supports Faith [Erwin]'s testimony" (J.A. 84), the facts it points to seem equally consistent with Petitioner's spontaneous statements to police. *See* page 6, above. Moreover, Faith did not say the body was run over twice. *See* J.A. 26. Only Petitioner's description of the events squares with the pathologist's conclusion that occurred, which was the most significant single piece of circumstantial evidence in the case.

[17] In this connection, it is worth noting that it was defense counsel who elicited the testimony from Dr. Holka, regarding

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Beyond that, as Justice Cameron's concurring opinion points out, to find "needless mutilation" or "gratuitous violence" would require more than just a determination that Petitioner was driving; it would require a finding that he purposely ran over the victim a second time after he was dead. J.A. 93-4. Justice Holohan's "majority" opinion does not make such a finding; nor could it. As Justice Cameron points out, "there has been no showing that this defendant inflicted any violence on the victim which he must have known was 'beyond the point necessary to kill,'" and "there is no suggestion of distinct acts, apart from the killing, specifically performed to mutilate the victim's body." J.A. 94. If such a finding had been made, it could not be sustained even under the deferential standard of *Lewis v. Jeffers* and *Jackson v. Virginia*, 443 U.S. 307 (1979). But no such finding was made.[18]

In light of all these considerations, we do not believe Justice Holohan's opinion can be fairly read as applying the established *Gretzler* definitions to the trial court's "heinousness" determination. Alternatively, it could be construed as creating a new, expanded definition of "heinousness," which would apply whenever a killing results

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the lapse of time between the two sets of injuries to Mr. Crummett's body. *See* page 7, above. To later use that evidence to support an aggravation finding that had no precedent in Arizona law at the time of trial, seems particularly unfair. *Cf. Coleman v. McCormick*, 874 F.2d 1280 (9th Cir. 1988), *cert. denied* 110 S.Ct. 349 (1989).

[18] Again, to the extent a *Jackson* analysis applies here, it would appear to require deference to the decision of the 3-2 majority of the Arizona Justices on this point, who found no support for a finding of "heinousness" under these *Gretzler* definitions. *Cf. Burden v. Zant*, 111 S.Ct. 862 (1991).

in "ghastly" injuries. But that construction suffers from another set of problems. Since a majority of the Arizona Justices rejected this, it cannot be considered part of "the definition given to the . . . provision by the Arizona Supreme Court. . . . " *Walton v. Arizona*, 110 S.Ct. at 3058. If it were, as Justice Cameron pointed out, it would surely run afoul of the injunction in *Godfrey v. Georgia*, that "[a]n interpretation of [the aggravating circumstance] so as to include all murders resulting in gruesome scenes would be totally irrational." 446 U.S. at 433 n.16. And in any event, to perform their constitutional function, limiting definitions cannot be manufactured in and for a particular case; they must be "establish[ed] in advance." *See Walton v. Arizona*, 110 S.Ct. at 3067 (concurring opinion of Justice Scalia).

The only remaining possibility – and the one that we would submit its language best supports – is that Justice Holohan's opinion did not apply a narrowing definition at all, but simply relied on all the circumstances to determine that the crime was "heinous" and "depraved." If so, its decision plainly violates the teachings of *Maynard v. Cartwright*, 486 U.S. at 360.

> This approach of reviewing the totality of circumstances surrounding the murder was rejected by the Supreme Court in *Maynard v. Cartwright*. The Tenth Circuit, in the *Maynard* opinion affirmed by the Supreme Court, held that '[c]onsideration of all the circumstances is permissible; reliance upon all the circumstances is not.' 822 F.2d 1477, 1491 (10th Cir. 1987) (*en banc*).

Moore v. Clarke, 904 F.2d at 1233. *See also Clemons v. Mississippi*, 110 S.Ct. at 1446; *Newlon v. Armontrout*, 885 F.2d 1328, 1334-5 (8th Cir.), *cert. denied* 110 S.Ct. 3301 (1990).

In sum, we can identify no possible reading of Justice Holohan's opinion that can be squared with this Court's precedents. But even if we have missed some conceivable interpretation of it that could pass muster, there is too much uncertainty about its rationale and its view of the underlying facts. At the least, there is a reasonable likelihood that the "majority" Justices failed to apply a constitutionally acceptable limiting definition of these crucial terms. Such a likelihood is sufficient to call for reversal in any criminal case. *Estelle v. Maguire*, 112 S.Ct. 475, 482 (1991). It must especially be so where life is at stake, in view of the "long-standing recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary." *Saffle v. Parks*, 110 S.Ct. 1257, 1262 (1990). *See Clemons v. Mississippi*, 110 S.Ct. at 1451; *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (concurring opinion of Justice O'Connor). Because of that, and "[b]ecause the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty," *Stringer v. Black*, 112 S.Ct. at 1139, the judgment of the "majority" Justices cannot stand.

II.

THE CONCURRING OPINION OF TWO ARIZONA JUSTICES DEPRIVED PETITIONER OF THE INDIVIDUALIZED SENTENCING GUARANTEED HIM BY THE EIGHTH AMENDMENT.

Although they recognized the problems with the "majority's" reliance on the "heinous" aggravating circumstance, the two concurring Arizona Justices nonetheless fell into constitutional error in their decision to affirm Petitioner's death sentence.

After explaining his conclusion that "[t]his crime is . . . not above the norm of first degree murders," Justice Cameron's concurring opinion simply states "[t]he criminal record of this defendant, however, clearly places him above the norm of first degree murderers," and "[t]his history of serious violent crime justifies the imposition of the death penalty." J.A. 96. The opinion concludes: "I concur in the opinion of the majority except its finding that this crime was heinous and depraved, and I concur in the result." *Ibid.* But that concurrence cannot have extended to the "majority's" "independent review" of Petitioner's sentence; for in that review one of the facts that was "[p]articularly . . . note[d]" was the very factor the concurrence rejected, "the gruesome manner in which this murder was committed." J.A. 90.

As Justice Feldman's dissent pointed out, this was of central significance because much of the mitigating evidence went to the same issue as the aggravating circumstances which the concurring Justices left standing: the defendant's character. J.A. 96. It was for this reason

Justice Feldman emphasized his disagreement with the concurring Justices' approach:

> [I]ndependent review on the death penalty issue involves more than a determination of whether the trial court's imposition of this penalty can be supported by the record. It requires our own, independent conclusion from the record. . . . While the aggravating circumstances which were found to exist may indicate that the defendant was above the norm of murderers, the evidence of changed character is persuasive mitigation. Review of this record indicates strong evidence of rehabilitation and the probability that if allowed to live, defendant will make a contribution of some value to society.

J.A. 100 (footnote omitted).

On this point, Justice Feldman's argument is clearly correct. *Clemons v. Mississippi, supra*. A defendant's prior record, however bad, does not remove "[t]he constitutional mandate of individualized determinations in capital-sentencing proceedings." *Sumner v. Shuman*, 483 U.S. 66, 75 (1987). This Court has rejected the suggestion that "the Eighth Amendment permits the state appellate court in a weighing State to affirm a death sentence without a thorough analysis of the role an invalid aggravating factor played in the sentencing process." *Stringer v. Black*, 112 S.Ct. at 1136.

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.

Id. at 1137.

The Court of Appeals panel attempted to avoid this logic by denying that Arizona is a weighing state. J.A. 132. The validity of that position depends, of course, on the role of aggravating circumstances under state law. *Zant v. Stephens*, 456 U.S. 410 (1982); *Zant v. Stephens*, 462 U.S. 862, 873 (1983).

Arizona's statute provides that once an aggravating circumstance is found, the sentencing decision turns on whether any mitigating circumstances are "sufficiently substantial to warrant leniency." Ariz. Rev. State. § 13-703(E). Although the statute does not explicitly say that the "substantiality" of any mitigating factors depends, in part, on the number and nature of the aggravating factors found, the Arizona Supreme Court has repeatedly so held.

> [The trial judge and this] court on review . . . must determine whether the mitigating circumstances are "sufficiently substantial to call for leniency." . . . This necessarily involves the difficult weighing and balancing of the aggravating and mitigating circumstances present.

State v. Gretzler, 659 P.2d at 13.

> We have described the formula of "sufficiently substantial to call for leniency" as involving the weighing of aggravating against mitigating circumstances on the basis of the gravity of each circumstance.

State v. Harding, 137 Ariz. 278, 670 P.2d 383, 397 (1983).[19] The premise of this resentencing requirement is that different

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[19] *Accord, State v. Fierro*, 166 Ariz. 539, 804 P.2d 72, 81 (1990); *State v. Jimenez*, 165 Ariz. 444, 799 P.2d 785, 794 (1990); *State v. Serna*, 163 Ariz. 260, 787 P.2d 1056, 1065 (1990); *State v. Marlow*, 163 Ariz. 65, 786 P.2d 395, 402 (1989); *State v. Rossi*, 146 Ariz. 359, 706 P.2d 371, 379 (1985); *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322, 1326 (1979); *see also* J.A. 88.

numbers and combinations of aggravating factors carry different weights. *See State v. Schaaf*, 169 Ariz. 323, 819 P.2d 921 (1991).

Thus, the Arizona Supreme Court, "which is the final authority on the meaning of [Arizona] law, has at all times viewed its sentencing scheme as one in which aggravating factors are critical in the . . . determination whether to impose the death penalty." *Stringer v. Black*, 112 S.Ct. at 1139. The panel decision below simply misunderstood this. The Arizona Supreme Court has not accepted its mischaracterization, but has continued since the panel decision to describe its statute as requiring the weighing of aggravation against mitigation.[20]

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[20] *See, e.g., State v. Atwood*, 1992 WL 72290 (Ariz., April 9, 1992) at *75 ("Under Arizona's death penalty statute, the trial court may give aggravating weight only to that evidence which tends to establish the aggravating circumstances specifically enumerated in A.R.S. § 13-703(F). . . . "); *State v. Rossi*, 1992 WL 65714 (Ariz. April 2, 1992) at *4 ("If . . . mitigating circumstances are found to exist, they must be weighed by the court to determine whether they are 'sufficiently substantial to call for leniency.'"); *State v. Brewer*, 826 P.2d 783, 801 (Ariz. 1992) ("On appeal, our task is independently to 'review the record to determine whether any mitigating circumstances outweigh aggravating circumstances.'"); *State v. Cook*, 170 Ariz. 40, 821 P.2d 731, 751 (1991) ("We [determine whether the death sentence is appropriate] . . . by reviewing the aggravating and mitigating circumstances found by the trial court to ensure that they were properly determined and weighed."); *id.* at 756 ("[D]isparity between the sentences of the sort that occurred in

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Like most weighing states, the Arizona Supreme Court has stated that its "usual practice in a case such as this [where an aggravating factor is invalidated] is to remand to the trial court for reconsideration of the death sentence in light of our findings of aggravation and mitigation." *State v. Fierro*, 804 P.2d at 88.[21] However, it has occasionally exercised its option, under *Clemons* and *Walton*, to perform the resentencing itself. *See, e.g., State v. Brewer, supra*. But it has not changed its view of the fundamental nature of its sentencing law.

Although it uses slightly different language, that law is essentially the same kind of "weighing" statute which was involved in *Clemons* and *Stringer*. That invokes the Eighth Amendment principle reiterated in *Clemons v. Mississippi*:

> An automatic rule of affirmance in a weighing State would be invalid under *Lockett v. Ohio*, 438 U.S. 586 . . . (1978), and *Eddings v. Oklahoma*, 455

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this case must be considered and may be found as a mitigating circumstance and weighed against any aggravating circumstances, in determining whether to impose the death penalty."); *State v. Lavers*, 168 Ariz. 376, 814 P.2d 333, 348 (1991) ("we independently determine the weight given each such [aggravating and mitigating] circumstance and whether the mitigating circumstances are sufficient to outweigh the aggravating circumstances."); *id.* at 353 ("we have carefully weighed the aggravating and mitigating circumstances and have concluded that . . . the mitigating circumstances are not sufficiently substantial to call for leniency.")

[21] *See also, e.g., State v. Schaaf*, 819 P.2d at 920; *State v. Hinchey*, 165 Ariz. 432, 799 P.2d 352 (1990); *State v. Lopez*, 163 Ariz. 108, 786 P.2d 959, 963 (1990); *State v. Gillies*, 135 Ariz. 500, 662 P.2d 1007, 1023 (1983).

> U.S. 104 . . . (1982), for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances. *Cf. Barclay v. Florida*, 463 U.S. 939, 958 . . . (1983).

Clemons v. Mississippi, 110 S.Ct. at 1450. Although they departed from, rather than announcing, a "rule," what the concurring Arizona Supreme Court Justices did in this case was essentially the same thing the Mississippi Supreme Court did in *Stringer*: they affirmed on the ground that "the evidence fully support-[ed] . . . statutorily required aggravating circumstances . . . and the death sentence was not disproportionate to sentences imposed in other cases." 112 S.Ct. at 1134 (internal quotations omitted). Compare J.A. 95-6. Where the judgment under review included an improper aggravating factor – and where, under state law, that factor had been weighed in the scales of life and death – that violates the Eighth Amendment.

III.

IF THERE IS CONSTITUTIONAL ERROR IN EITHER OF THE TWO ARIZONA SUPREME COURT PLURALITY OPINIONS, REVERSAL IS REQUIRED HERE.

As should be plain from the above, it is Petitioner's submission that both of the Arizona Supreme Court's plurality opinions are infected by constitutional error. But even if we are wrong on one of those points, reversal is required here.

Without the concurrence of both of these two-Justice pluralities, the outcome of this case would have been

different. Had either group applied a constitutional analysis and reached a different conclusion, together with the dissenting Justice they would have formed a majority to reverse or vacate Petitioner's sentence of death. That means both groups' errors were harmful.

In similar situations – when the votes of lower court judges necessary to make up a majority are based on a premise that is invalid under federal law – the Court has held that remand is necessary. *United Airlines v. Mahin*, 410 U.S. 623, 632 (1972).[22] Because of "the precision that individualized consideration demands under the *Godfrey* and *Maynard* line of cases," *Stringer v. Black*, 112 S.Ct. at 1137, that rule should apply with particular force in this context.

CONCLUSION

Although the Court has held that appellate judges, no less than trial judges or jurors, may be empowered to make the decision between life and death, *Clemons v. Mississippi, supra*, it has not exempted them from the requirement that such decisions be made in a manner consistent with the Eighth Amendment. Because that requirement was not met by either of the two groups of state Justices whose decision was necessary to sustain Petitioner's death judgment, that judgment must be reversed.

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[22] *Cf. Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); *California v. Krivda*, 409 U.S. 33, 35 (1972); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 443 (1952). *See also Hartman v. Greenhow*, 102 U.S. 672, 676 (1881) (review of decision of equally divided lower court).

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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